90-1605

Supreme Court, U.S.
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No:_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LIH Y. YOUNG,

Petitioner

v.

SECRETARY OF HEALTH &
HUMAN SERVICES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether complaint procedures are only for formality, as in this case, when discrimination with respondent's misconducts, irregular procedures and bad faith prevailed in employment environment and administrative and judicial proceedings against petitioner.

2. Whether the Lower Court departed from usual course of judicial proceedings by et. alias.: (a) ignoring material issues raised in four administrative complaints alleging continuing discrimination and retaliation with respondent's misconducts in employment environment and administrative procedures;[1] (b) sparce and clearly erroneous findings and rulings unsupported by the record below and conflicted with rules, regulations and case laws; (c) abuse of discretion including disposal of

petitioner's abundant testimonies with voluminous self-explanatory documentary evidence, resulting in clearly erroneous trial transcripts missing all plaintiff's testimonies and evidence, and incomplete court file.

3. Whether the Lower Court erred in failing to address (a) jurisdictional problems before ruling on merits of complaints; (b) respondent's improper rejection and disregard of a significant portion of complained issues from two of the four administrative complaints; (c) respondent's subsequent cancellation of all four administrative complaints entirely, because petitioner had filed a civil action to appeal respondent's prior rejection of complained issues; (d) the objectives or scope of the trial; (e) remand of complaints to the respondent for full investigation, especially more

complaints still pending in the respondent since March 1984;[2]

4. Whether the Circuit Court erred in (a) denying a timely filed petition for rehearing and suggestion for hearing en banc, especially after the petitioner had discovered and filed back those missing evidence and relevant documents improperly disposed of by the District Court; (b) denying a more reasonable extension of time to file petition for rehearing when petitioner's counsels suddenly withdrew their appearances; and (c) denying audio tapes to verify errors in the trial transcripts which are not petitioner's fault.

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1 Respondent's misconducts and improper acts include, et. alias., (a) obstruction of work and justice; (b) false data and secret changes of data for petitioner to use for research; (c) secret changes of performance appraisal; (d) discriminatory promotion, award, reassignment, task assignment; (e) unfavorable working conditions; (f)

unwarranted personnel actions; (g) perjuries, false statements, and misleading documents; (h) unjust manipulation and investigation of compalints (e.g., postponement, disregard, rejection, fragmentation, closing, and cancellation); (i) refusal to provide information even paid as charged; (j) maintenance of false or incorrect complaint information.

2 Petitioner filed two administrative complaints against the National Center for Health Services Research, another unit of the respondent DHHS. These complaints were also improperly processed and fragmentated by the respondent, which forced petitioner through multiple civil actions, and are pending investigation by the DHHS. However, the respondent has still refused to investigate properly.

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OPINIONS BELOW:

U.S. Court of Appeals for the District of Columbia Circuit, Case No. 89-5387: Judgment and Memorandum entered on October 1, 1990; Orders entered on December 17, 1990 denying plaintiff's petition for Rehearing and Rehearing En Banc.

U.S. District Court for the District of Columbia, Case No. 88-0004: Findings of Fact and Conclusions of Law, and Judgment Order entered on July 26, 1989.

The final decisions of EEOC dated July 28, 1988 (ORA Docket No. 01881579) on petitioner's administrative appeal. DHHS final decisions dated February 11, 1988 to cancel all four complaints.

The final decisions from EEOC dated November 30, 1987 (ORA Docket No. 01871586) on petitioner's administrative appeal. The final decision of DHHS dated

March 9, 1987 to reject and disregard a significant portion two administrative complaints.

DHHS decision dated October 26, 1985, and an amended decision dated December 16, 1985 on an administrative complaint.

JURISDICTION:

The Judgment of the Court of Appeals on case No. 89-5387 was entered on October 1, 1990. A petition for Rehearing and Suggestion for Hearing and Rehearing En Banc was denied on December 17, 1990. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sec. 1254(1).

The Supreme Court's Order (A-675) dated March 11, 1991 granted a time extension to and including April 16, 1991 to file petition for writ of certiorari.

STATUTORY PROVISIONS AND RULES:

This action is based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et. seq., 29 C.F.R. Sec. 1613, and Federal Rules of Civil Procedures 52(a) as provided in the appendix.

STATEMENT OF THE CASE:

Petitioner was employed by National Center for Health Services Research (NCHSR), a unit of the DHHS, from December 1978, but resigned under constructive discharge on March 19, 1984.[3]

Petitioner was then hired from April 30, 1985 by the Office of Family Assistance (OFA), another unit of DHHS just before a hiring freeze. Petitioner was soon discriminated and placed under unfavorable conditions of constructive discharge short of a resignation, but was eventually terminated under wrongful

discharge on June 13, 1986.

Beginning May 1985, petitioner sought EEO counseling and timely filed administrative complaints claiming continuing discrimination, retaliation and patterns of violations in DHHS, with numerous discriminatory acts by respondent's misconducts and unfair approaches, which have been chronologically documented with supporting documents provided to management and EEO counselors.

See Complaint No. SSA-442-85, SSA-102-86, SSA-366-86, and SSA-466-87. (Note that SSA and FSA in complaint numbers are interchangeable, as DHHS has labelled them either way.) SSA-466-87 with a separate list of complained issues, emphasizes more on improper processing of complaints, which exemplify discriminatory acts in employment enviornment.

For the first complaint SSA-442-85 filed on July 1, 1985, DHHS indicated that all complained issues were accepted, and investigation will be thorough. But only four issues were written in DHHS acceptance letter of October 26, 1985. It was amended to include three additional issues in its letter of December 16, 1985. However, the investigation was strictly limited to those issues, as written and narrowly defined by DHHS. DHHS provided perjuries, false statements and misleading documents to the investigator. Petitioner appealed such improper investigation and disposition of this complaint to DHHS, and requested a hearing.

An administrative judge was assigned from the EEOC for the hearing, but investigation was still strictly limited to the issues narrowly defined by DHHS, and DHHS refused to provide information

despite the administrative judge's order. This first complaint SSA-442-85 was pending hearing until DHHS cancelled all four complaints unilaterally, without a written notice to petitioner or to the administrative judge in advance.

The second and third complaints SSA-102-86 and SSA-366-86 were timely filed on January 24, 1986 and June 27, 1986 respectively. DHHS combined these two complaints in its decision dated March 9, 1987. Only a few issues from these two complaints were accepted; another few were rejected with the reason that these rejected issues were not shown in EEO counseling report; while a large portion of complained issues were disregarded. Petitioner appealed such rejection and disregard of complained issues to EEOC with reasons and supporting documents, considering especially that (a) the

complaints alleged continuing discrimination; (b) the complained issues have been presented to EEO counselors; (c) there were other complaints pending in DHHS; (d) EEO coordinator advised petitioner that no more EEO counseling was necessary; and later (e) case law Young v. National Center for Health Services Research (4th Cir. 86-1081) supports the acceptance of complained issues because of continuing discrimination and indicates DHHS pattern of improper rejection of complaint.

As usual, EEOC affirmed DHHS decision on November 30, 1987 with one exception concerning the denial of annual leave that EEOC instructed DHHS to refer this issue and new matters to EEO counselor, and to comply with the requirement of filing reports, but DHHS never follows EEOC instruction.

To appeal such rejection and disregard of complained issues from the two of four administrative complaints after exhausted administrative procedures, petitioner timely filed a pro se case No. 88-0004 with the District Court on December 31, 1987, which was placed in the court file on January 5, 1988, and the case was assign to District Judge Revercomb.

On February 11, 1988, DHHS swiftly cancelled all four administrative complaints with the reason that the petitioner had filed a civil action. The cancellation of all four complaints includes: (a) administrative complaint SSA-442-85; (b) those complained issues previously accepted in SSA-102-86 and SSA-366-86; (c) one complained issue concerning the denial of annual leave that DHHS and EEOC did not included in existing

four complaints; and (d) the fourth complaint No. SSA-466-87 which DHHS had not even issued its acceptance or rejection letter.

Petitioner appealed such arbitrary cancellation to EEOC, and meanwhile requested the District Court for stay processing of case 88-0004, pending EEOC decision on such cancellation. The District Court denied the request on May 27, 1988, and EEOC affirmed DHHS decision on July 29, 1988. The civil action 88-0004 was then amended to include the appeal of such cancellation of complaints by petitioner's counsel Joel P. Bennett. On March 21, 1988, in its answer to the original pro se case 88-0004, DHHS stated that the Court lacks jurisdiction and that plaintiff has failed to state a claim. The Petitioner was unnecessarily restricted in testimony at the trial by the District

Judge, except to provide Plaintiff Exhibits No. 1-134, which are several inches high voluminous self-explanatory documents to be treated as plaintiff's affidavits, testimonies and evidence. After proposed findings of fact and conclusions of law from both parties and their responses to these findings, District Judge issued an order finding no discrimination and no retaliation in favor of DHHS on July 26, 1989.

Petitioner appealed the District Court decision to the U.S. Court of Appeals for the District of Columbia Circuit,[0] through different counsels, James H. Heller and Richard Salzman. The Circuit Court affirmed the District Court decision on October 1, 1990.

Petitioner discovered that some important documents were not in the court file, such as petitioner/ plaintiff's

exhibits, which were improperly disposed of by the District Court. Other documents that were not found in the court file include "plaintiff's proposed findings of fact and conclusions of law," and "plaintiff's response to defendant's proposed findings of fact." This leaves trial transcripts with errors and missing plaintiff's testimonies and evidence. DHHS false statements are getting louder as in their appellee's brief, while petitioner's position seems weakened, partly due to the faults of petitioner's counsels. Because of these problems in court proceedings, the complexity resulted therein, and petitioner's counsels' withdrawl of their appearances, petitioner requested a more reasonable extensions of time and page limits to file petition for rehearing and suggestion for hearing and rehearing en banc without success. The Courts also

denied petitioner's request for audio tapes on the trial to verify the errors in the transcripts, which are not petitioner's fault. [4]

Petitioner filed the above mentioned missing documents to the Circuit Court, and timely filed a petition for rehearing and suggestion for hearing and rehearing en banc. The Circuit Court entered a denial on the rehearing on December 17, 1990, and another denial on the suggestion for hearing en banc. The Circuit Court has not sent the petitioner these decisions.

Petitioner requests that this Honorable Court review the record below, reverse the decisions below, remand the case, and grant other relieves in favor of the petitioner.

REASON FOR GRANTING THE PETITION:

1. EVIDENCE - PLAIANTIFF EXHIBITS 1-134 AT THE TRIAL: [5]

Petitioner is an Asian American of Chinese origin, with a Master degree and a Ph. D. in economics from the United States. She is a skilled professional with experience in statistical research and computer use. See Plaintiff Exhibit 1 (abbreviated as Pl. Ex. 1.) in the record below. Shortly after her employment with the OFA as a GS-12 program analyst, she was assigned to serve on a research studies panel in collaboration with other agencies outside of OFA. Pl. Ex. 2 and Mr. Weinberg' testimony.

During her employment with OFA, petitioner's work include: review of research studies, research design, computer programming and operation,

analysis of data, preparation of research reports and abstracts, review of co-workers' work including those of higher GS-levels, and other technical services. For examples of petitioner's work in the record below, see Pl. Ex. 4, 23-25, 35, 36, 37, 43, 44.., 134. and in the administrative complaint files. Although job descriptions for all GS-12 and GS-13 employees are practically the same, the job tasks varied greatly, contrary to the supervisor's testimony. See petitioner's comments on the investigative file for administrative complaint SSA-442-85, Pl. Ex. 85.

Petitioner advised the supervisors and senior staff that the data for petitioner's research had been changed secretly without notifying petitioner. This caused research impossible, because of different specifications in computer

language and formats and because of meaningless information, false data sets and other mysteries and hindrance. Supervisors would not investigate or correct the problems. Instead, supervisors just kept shifting research topics and facilities, such as different computer systems or computer terminal languages. There was a series of unfair scheme and unjustified constraints imposed on petitioner by supervisors and their designated staff to obstruct petitioner's work, and placed petitioner in a difficult and disadvantaged position. See Pl. Ex. 3-6, 9-24.

Petitioner's performance was unfairly evaluated to reflect co-workers' poor performance. Supervisor suppressed petitioner's quality and achievements. See petitioner's comments on performance evaluation. Even worse, supervisors

secretly lowered the ratings of petitioner's performance appraisal, and se· it to the Personnel Office as a permanent record without petitioner's knowledge. Supervisor also deprived petitioner of credit for her technical work on the research studies panel with Mr einberg mentioned above. Compare Pl. Ex. 7 and 8.

As directed by the supervisor, petitioner continued to provide technical review of the work done by co-workers, and advise them of problems, but were ignored. See Pl. Ex. 85. Petitioner was asked to review incorrect computer printouts without making corrections. Supervisor eventually asked petitioner to prepare a summary of comments, which petitioner did on January 22, 1985.

A few months after the research project with Gay Morris was cancelled,

supervisor prepared a belated memo dated April 5, 1985 in response to petitioner's comments of January 22, 1985. Supervisor's response provided no instruction on how to proceed with the research by resolving the problems on data, variables, and his unjustified assumptions and constraints. His belated response implicitly recognized some of the problems that petitioner advised them of. But he still refused to make corrections that made the research very difficult and meaningless. His belated response was used just in time to support his lower ratings for petitioner's performance. Petitioner appealed such discriminatory acts and other problems to higher official, and later sought EEO counseling and filed administrative complaint. Pl. Ex. 25.

In order to bring computer skill up

to date with the state of the art, and to do the research work more efficiently and effectively, petitioner requested advanced computer training several times, but were all denied unjustifiably by budget or any other reason, while other co-workers, especially Gay Morris, were allowed as much training as they wanted, although they were not ready for some types of training, except for personal credential. Pl. Ex. 26-30, 84. Eventually, supervisor wanted petitioner to take some introductory courses repetitively and other training not directly job-related. It was only toward the end of petitioner's employment when supervisor approved advanced computer training, after filing complaints.

In April 1985, supervisor insisted petitioner to sign a progress review written by supervisor in pencil.

Petitioner refused to sign it, since it could then be changed. Pl. Ex. 31-32. Petitioner also rebutted the negative comments in the April 1985 progress review. Pl. Ex. 34.

There were other work products that petitioner had submitted to supervisors, such as research report, computer work, etc., which were at a higher technical level than co-workers'. At a minimum, reviews of co-workers' work from technical point of view, would be hundreds of pieces of work. But supervisors suppressed petitioner's such efforts and technical services.

Petitioner continued to rebut supervisor's false statements on petitioner's work, e.g., Pl. Ex. 39. Pl. Ex. 41-42. Despite harsh treatment and difficult constraints, petitioner continued to turn in work product, e.g.,

Pl. Ex. 43-44. She also appealed unfavorable progress review and research environment to her second level supervisor, Howard Rolston, with some work products and computer printouts. Pl. Ex. 45. Howard Rolston prepared a memorandum with false and unjustified statements implying that petitioner did not do any work or exploratory analysis. Pl. Ex. 46.

In May 1985, petitioner began seeking EEO counseling. In June, 1985, petitioner was unwarrantedly humiliated by a note from her supervisor that petitioner should inform him of her whereabout. It has a false implication and is discriminatory, because petitioner was singled out among all employees. Pl. Ex. 50.

Petitioner filed her first administrative complaint on July 1, 1985, which detailed all aspects of her complaint and contains distinct

documentary evidence of substantiation for her complaint. Pl. Ex. 51 and 52. In the meantime, supervisor was unfairly placing selective documents in petitioner's official agency files to her detriment. Pl. Ex. 53.

Petitioner complained about discriminatory acts and other problems, e.g., her supervisor did not attach her comments to adverse appraisals. Pl. Ex. 54-58, 60-61. Petitioner continued to appeal to her higher level supervisors concerning unwarranted disciplinary actions. However, the agency gave her the runaround. Pl. Ex. 62-64 and 66.

Petitioner continued working on the characteristics of AFDC recipients and the factors influencing their participation and length of stay. Petitioner also sought to participate in professional meetings and present papers in professional

conferences. e.g., Pl. Ex. 67-72, 75. However, petitioner's requests were all disregarded or unduly denied. Petitioner was also denied clerical assistance, support services, equipment and goods needed to perform her work.

Petitioner filed another formal complaint of discrimination SSA-102-86 on January 24, 1986. Pl. Ex. 73. She was then unjustly suspended. She complained and appealed that suspension to higher levels of management without success. Pl. Ex. 74. In fact, petitioner was prohibited to do research even on the supervisor's topics,but was not able to obtain proper data and other necessary information from the supervisor.

In May 1986, the agency proposed a removal for failure to do her work. Petitioner opposed that removal. Pl. Ex. 78 and 79. Petitioner submitted

additional material supporting her claim of discrimination. Pl. Ex. 80-82.

Petitioner also submitted performance evaluations of her co-workers which demonstrates that Mr. Bordes was giving others high ratings and only petitioner was singled out for low ratings and negative comments from the begining. Pl. Ex. 83. Petitioner's also submitted information regarding discriminatory computer training and costs. Pl. Ex. 84.

Petitioner submitted voluminous comments on the investigative report on her first administrative complaint SSA-442-85, especially concerning perjuries, false statements and misleading documents supplied by DHHS. The agency had no further comments on the investigative report. Pl. Ex. 86 and 87.

Administrative complaint SSA-466-87 was filed on August 31, 1987 claiming

respondent's improper processing of complaints and failure to provide information for examination of discrimination, even paid as charged. Pl. Ex. 94.

The agency's improper handling of her complaints has been confirmed in two judicial decisions involving other complaints ASH-401-84 and ASH-262-84, pending in the respondent since March 1984. Pl. Ex. 95 and 99. EEOC also found the agency's handling of petitioner's complaints to be lacking, especially concerning the issue of denial of annual leave. Pl. Ex. 96.

Petitioner filed another administrative complaint OSH-82-89 on June 30, 1988 which was rejected by DHHS, and then refiled on November 16, 1988, but was assigned a complaint number not conforming to DHHS calendar system. Pl. Ex. 98.

Petitioner also submitted facts of discrimination, based on job description, employees' employment history of GS-levels or promotion and training, etc. Pl. Ex. 100 - 104.

Petitioner has also demonstrated that the respondent's misconducts and improper processing of her administrative complaints including false statements and incorrect complaint records maintained by the respondent, as well as procedural irregularities. Pl. Ex. 59, 65, 76-77, 88-93, 97, and 105-133.

Another good example of petitioner's work product to rebut supervisors' testimony that petitioner had done no work is an abstract based on a review of a research study, which supervisor Rolston admitted at the trial to have seen it. Pl. Ex. 134 and Howard Rolston's testimony.

2. LOWER COURT ERRED IN FINDING NO DISCRIMINATION AND RETALIATION, WHEN PETITIONER HAS ESTABLISHED PRIMA FACIE CASE AND PREPONDERANCE OF EVIDENCE PROVING DISCRIMINATION, RETALIATION AND RESPONDENT'S MISCONDUCT;

Petitioner alleged various distinct discriminatory acts, continuing discrimination and retaliation based on race, national origin and reprisal under Title VII of Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et. seq., 29 C.F.R. Sec. 1613, as provided in Appendix.

Petitioner provided ample evidence and supporting documents for her allegations of discrimination and respondent's pretext for discrimination. Petitioner has adequately carried out her burden of proof as required by law. See records below in court files and administrative complaint files, including

Plaintiff Exhibits 1-134, which are several inches high voluminous self-explanatory documentary evidence admitted at the trial, as briefly introduced in the section above. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Garner v. Boorstin, 690 F.2d 1034, 036 (DC Cir. 1982).

Besides, direct evidence of discrimination is not required for a finding of a violation of Title VII. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

The elements of a prima facie case of employment discrimination are not confined to a rigid, mechanistic formula, but may vary from case to case depending on the underlying factual situation. McDonnell Douglas, 411 U.S. at 802 n. 13; Furnco

Construction Co. v. Waters, 438 U.S. 567, 575-76 (1978).

To show a violation of Title VII, it is sufficient to show that discrimination played some part in the challenged actions of defendant; discrimination need not be the dominant or controlling factor. Sawyer v. Russo, 19 E.P.D. 8996 (D.D.C. 1979); Berio v. EEOC, 18 E.P.D. 8847 (d.d.c. 1979); Bradington v. International Business Machines Corp., 360 are otherwise unexplained. Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Jones v. Trailways, Inc., 477 F. Supp. 642, 645 (D.D.C. 1979).

In the Title VII cases such as the instant case in which disparate treatment forms the crux of the case, a plaintiff can, and ordinarily must, rely on inferential, rather than intentional evidence of discrimination. Sweeney v.

Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978); vacated and remanded on other grounds, 439 U.S. 24 (1978); Muller v. U. S. Steel Corp., 509 F. 2d 923 (10th Cir. 1975), cert. denied, 423 U.S. 825; Marquez, supra; Blue Bell Boots, Inc., v. EEOC, 418 F.2d 355 (6th Cir. 1969); Berio, supra. See Cuddy v. Carmen, 694 F. 2d 853, (D.C. Cir. 1982).

Once it is shown that an employee has been discriminatorily treated, she is entitled to an order granting her the appropriate relief, unless defendant can show by a preponderance of the evidence that plaintiff would have been treated the same way even absent discrimination. Hopkins v. Price Waterhouse, (1989).

Respondent failed to provide any evidence except witnesses' oral testimonies and some documents authored by supervisors for unwarranted personnel

actions, that the petitioner had complained and rebutted. All the supervisors and respondent's witnessess, including Paul Bordes, Howard Rolston, Wilber Weder and Gay Morris, had been involved and conspired with misconducts in practicing discrimination against the petitioner, as documented and presented at the trial as evidence. Their brief oral testimonies are either false or inconsistent, and are not creditworthy.

RETALIATION/REPRISAL:

Petitioner has also alleged reprisal or retaliation for her filing prior EEO complaints or protected activities under Sec. 704(a) of Title VII.

Petitioner has demonstrated that: she engaged in a protected activity; she was subject to an adverse action; and there was a causal connection between the two. McKenna v. Weinberger, 729 F. 2d 783, 791

(D.C. Cir. 1984); Camino v. EEPC, 707 F.2d 468 (11th Cir. 1983).

Petitioner's supervisors treated petitioner differently after learing of her engaging in protected activities; the closeness in time between the supervisors learning of petitioner's protected activities and the adverse actions; the fact that the adverse actions departed from procedural and substantive regularity; and retaliatory action are considered as part of the discrimination pattern.

Petitioner has met the standard of showing that retaliation played a part in the decision to take adverse action against her. Grant v. Bethlehem Steel Corp., 622, F.2d 43, 46 (2d Cir. 1980). However, even if a higher standard such as "a motivating factor" or a "but for" test, petitioner meets both these standards.

See Womack v. Munson, 619 F.2d 1292, 1297 n.7 (8th Cir. 1980); Kauffman v. Sidereal Corp., 695 F.2d 343, 345 (9th Cir. 1983.)

3. LOWER COURT ERRED IN MANY ASPECTS WHICH DEPART FROM USUAL COURSE OF JUDICIAL PROCEEDINGS WITH FINDINGS UNSUPPORTED BY RECORD BELOW, DISPOSAL OF EVIDENCE, AND EXCESSIVE BURDEN OF PROOF ON PETITIONER;

Petitioner's four administrative complaints SSA-442-85, SSA-102-86, SSA-366-86 and SSA-466-87, were timely filed since July 1, 1985, but were unjustly manipulated, rejected and eventually cancelled altogether by the respondent as stated above, especially considering respondent's misconducts in processing of complaints, which exemplified discrimination with misconducts in employment environment. Such improper acts defeat the objectives of Title VII.

42 U.S.C. 2000e, et. seq., 29 C.F.R. Sec. 1613 regulation.

The Lower Courts erred clearly in many aspects which depart from usual course of judicial proceedings, with findings and rulings unsupported by the records below and conflicted with rules, regulations and case laws:

(A) disregarding most complained issues in four administrative complaints.

(B) ignoring respondent's misconducts, false statements, improper acts, and bad faith in administrative procedures and judicial proceedings;

(C) improper Court procedures and discretion;

(D) District Court's improper disposal of plaintiff's abundant testimonies, voluminous self-explanatory evidence and other documents;

(E) clearly erroneous trial transcripts missing plaintiff's testimonies and exhibits, and with errors of no petitioner's fault;

(F) clearly erroneous assertion of facts, credibility and findings unsupported by record below;

(G) unfair trial, rulings and burden of proof.

4. LOWER COURT ERRED BY FAILING TO RULE ON JURISDICTIONAL PROBLEMS; OBJECTIVES AND SCOPE OF TRIAL; AND RESPONDENT'S IMPROPER REJECTION, DISREGARD, AND CANCELLATION OF TIMELY FILED COMPLAINTS ALLEGING CONTINUING DISCRIMINATION WITH DISTINCT DISCRIMINATORY ACTS AND MISCONDUCTS;

District Court erred in failing to address:

(A) the respondent's improper rejection and disregard of a significant portion of complained issues from two of

the four administrative complaints;

(B) the respondent's subsequent cancellation of four administrative complaints entirely including previously accepted complained issues, because the petitioner had filed a civil action to appeal respondent's prior improper rejection and disregard of complained issues;

(C) the Court's jurisdiction of those rejected issues and cancelled complaints, or the respondent's improper manipulation and disposal of complaints;

(D) complainant's right to have the four administrative complaints remanded to the respondent for full investigation; especially MORE administrative complaints had been pending in the respondent since March 1984; and

(E) the objectives or the scope of the trial or hearing, especially when

Questions 2(A)-(D) above had not been addressed.

5. CIRCUIT COURT ERRED BY FAILING TO CONSIDER IMPROPER ACTS AND MISSING EVIDENCE CAUSED BY THE DISTRICT COURT IN AFFIRMING THE JUDGMENT, AND ERRED THE FOLLOWING:

(A) denying a timely filed petition for rehearing and suggestion for hearing and rehearing en banc, especially after the petitioner had discovered and filed back to the Circuit Court those missing evidence, testimonies and other documents that had been admitted in the trial, but improperly disposed of by the District Court;

(B) denying a more reasonable extension of time to examine problems and file petition for rehearing and suggestion for hearing and rehearing en banc when petitioner's counsels suddenly withdrew their appearances;

(C) denying petitioner's request for audio tapes to verify errors in the trial transcripts that are not petitioner's fault.

(D) failing to send Court decisions on denying petition for rehearing or suggestion for hearing and rehearing en banc, and failing to send other decisions. or sending untimely.

6. LOWER COURTS ERRED UNDER F.R.C.P. 52(a) BY FAILING TO ADDRESS ALL OF MATERIAL ISSUES RAISED BY PETITIONER'S ALLEGATIONS INCLUDING RESPONDENT'S MISCONDUCT.

The trial court, acting as factfinder, must address all of the material issues raised by the plaintiff's allegations. Underwood v. District of Columbia Armory Board, 816 F.2d 769, 775 (D.C. Cir. 1987). If the trial court makes adequate findings, they are reviewed

under the "clearly errorneous" standard of Rule 52(a).

The lower courts ignored most of complained issues alleged in petitioner's four administrative complaints SSA-442-85, SSA-102-86, SSA-366-86 and SSA-466-87 all timely filed. The lower court ignored ample evidence of pretext regarding petitioner's claims. Petitioner also detailed the disparate treatment and respondent's misconducts, false statements and obstruction of petitioner's work. The discrimination by misconducts were exemplified by respondent's improper processing of complaints by misconducts, and by maintaining incorrect complaint records. These were ignored by the lower courts. e.g., Pl. Ex. 59-65, 76-77, 88-93, 97, 105-133.

Petitioner was retaliated because of her filing complaints or protected

activities. The lower court made no mention of the remarkable pattern that Petitioner was punished after she made some form of complaint of discrimination.

Moreover, the lower court erroneously found that DHHS effectively addressed any problem petitioner was having with performing her job, before she started complaining of discrimination. That finding simply is not supported by the record. For examaple, petitioner was not afforded the advanced training she requested until after she had made repeated complaints of discrimination.

7. LOWER COURT'S FINDINGS ARE UNSUPPORTED BY THE RECORD BELOW, AND CLEARLY ERRONEOUS UNDER F.R.C.P. 52(a):

It is well settled that the question of discriminatory intent is a finding of fact subject to the clearly erroneous

standard of review. Krodel v. Young, 748 F.2d 701, 706 (D.C. Cir. 1984). While an appellate court should not reverse simply because it finds the petitioner's version of the facts to be more reasonable, Underwood v. District of Columbia Armory Board, 816 F.2d 769, 774 (D.C. Cir. 1987); Bishopp v. District of Columbia, 768 F.2d 781 785 (D.C. Cir. 1986), the Court must reverse if it is left with the "definite and firm conviction" that an error was made. Case v. Morisette, 475 F.2d 1300, 1307 (D.C.Cir. 1973).

The court below correctly concluded that petitioner had established a prima facie case of national original discrimination. But the court erred in finding no discrimination and no retaliation. Petitioner established that she had done her best under those difficult circumstances. Petitioner has

demonstrated that the agency's stated reason for their actions is not credible. Petitioner has established pretext, and is entitled to a finding of discrimination. King v. Palmer, 778 F. 2d 878 881 (D.C.Cir. 1985):

"Burdine makes it absolutely clear that a plaintiff who establishes a prima facie case of intentional discrimination and who discredits the defendant's rebuttal should prevail, even if he or she has offered no direct evidence of discrimination."

8. LOWER COURT ERRED BY IGNORING THE ABUNDANT EVIDENCE OF PRETEXT FOR APPELLANT'S RACE AND NATIONAL ORIGIN DISCRIMINATION CLAIM:

The trial court erred by ignoring the substantial evidence. This evidence demonstrated that it was the agency's differential treatment of appellant that was responsible for her alleged "performance problems," and not the

petitioner's unwillingness or inability to do the job. Pl. Ex. 1-134.

First, respondent DHHS suppressed all work products and discredited her qualification. Supervisors even ignored that she had served in a research studies panel collaborating with other unit of the respondent outside of OFA. There were false data and secret changes of data problems. When petitioner wanted to investigate the problems closely after supervisors refused to do so, petitioner was prohibited to get on computer.

When a higher GS-level co-worker Gay Morris (GS-13 program analyst) was assigned by the supervisor to run the data acquisition for the petitioner, Gay Morris was neither timely nor substantively responsive to petitioner's repeated reminders for completing the assignment given to Morris on October 29, 1984. Pl.

Ex. 11-16. Gay Morris delayed, even after supervisor told Morris to run the searches for the petitioner. (Tr. II, 41). In fact, petitioner did not receive all necessary preliminary information or at least some explanation for why the searches could not be completed, until late December 1984. Pl. Ex. 15. When finally Morris gave the last computer printouts, the data retrieval assignment for her was far from complete, and was found to be "incorrect". Gay Morris tried to explain away by the changes of assumption made by petitioner, but neither supervisors nor witnesses substantiated such explanation with evidence, and conflicted with the record below.

The research projects were cancelled one by one by the supervisor. Petitioner has not really seen or received clean data from them. The errors of data petitioner

received are not trivial, and must be corrected. So are the supervisor's concepts and research constraints. But the supervisors refused to do so. It made research impossible or produce meaningless results.

At least, petitioner provided technical reviews of hundreds of computer printouts run by coworkers, despite of their incorrect and redundant nature; prepared reports and a summary of petitioner's comments regarding such problems on January 22, 1985; and a research report based on the analysis of the available data. Pl. Ex. 44.

Actually, a write-up based on the data retrieved by Morris was not required at that time, because supervisor did not ask for it and because data were incorrect. The supervisor did not ask for it until after petitioner appealed to

Howard Rolston. Petitioner had progressed steps ahead whenever possible, e.g. petitioner's comments regarding such problems on January 22, 1985; and a research report based on the analysis of the available data. Pl. Ex. 44.

Lower Court erred by ignoring these, and disregarded petitioner's tremendous amounts of time and efforts necessary to accomplish these. The Lower Court erred by mistakenly counting the number of pages of petitioner's papers as the only work without considering technical level and difficult circumstance.

Petitioner advised her supervisor that

"Because of the inadequacy of the computer outputs and the problems in them, the tasks of the next stage would be difficult. In fact, I am hesitant to proceed to the next stage, because these first stage jobs are not only incomplete, but also have technical and conceptual problems." Pl. Ex. 16.

Petitioner set forth compelling

evidence demonstrating that it was the agency's own discriminatory conduct which cause the problems. Pl. Ex. 1-134. Petitioner was given no credit for the vast majority of the work she performed during her employment with OFA.

The lower court apparently focused only upon the agency's bald assertion that she had not done any work at all in two years. That was error, and unsupported by the evidence of record below. Case v. Morrisette, 475 F.2d at 1308. The evidence or record below leads to the inescapable conclusion that the petitioner was treated discriminatorily with respondent's misconducts, false statements and obstruction of work. Petitioner's ample evidence discredits the agency's attempt to lay the blame on the petitioner and is compelling evidence of pretext, ignored by the trial court.

9. LOWER COURT ERRED IN FINDINGS THAT PETITIONER WAS TIMELY AFFORDED ADEQUATE TRAINING:

Petitioner requested advanced computer training to update her computer skill to the state of the art of SPSS-X advanced statistical research program. Other employees, especially Gay Morris who requested computer training in this time frame were accommodated, yet the petitioner was denied, purportedly because of the budget. (Pl. Ex. 30). The Coordinator of the office training program, however, could recall no budgetary problems in that period. (Tr. I, 27). In fact, DHHS failed to produce any evidence confirming supervisor Bordes' stated reasons, i.e., "lack of budget."

It is settled that the denial of training based upon a protected classification violates Title VII.

Thompson v. Sawyer, 678 F.2d 257, 282 (D.C.Cir. 1982). Petitioner successfully discredited DHHS reason for denying or delaying her training with strong unanswered evidence of pretext. But the lower court never addressed these issues. That was plan error.

The trial court erroneously found that petitioner was given all of the training she requested by the time that supervisor returned to her the program aspect of her job. (Decision at 4.) That finding was belied by the record. By the time petitioner received the advanced training, the agency had already gone most of the way down the road to remove her. The trial court's erroneous ruling allowed it to ignore the critical issue of the timing of these events. Petitioner wasn't granted advanced computer training she requested that other employees liberally

received upon request, not until after she filed complaints, and not until after the damage to her reputation at OFA had been done. Supervisor had treated her as if she was incompetent. The lower court gave no critical attention to this important issue of timing. Its failure to do so was clearly erroneous and supports reversal.

10. LOWER COURT MADE INADEQUATE AND ERRONEOUS FINDINGS ON PETITIONER'S RETALIATION CLAIM:

As petitioner pressed her repeated complaints of continuing discrimination and harassment against her supervisors, she was confronted, virtually without fail, with a series of adverse or disciplinary actions taken against her. This evidence was clearly set forth in petitioner's trial exhibits 1-134, and yet was apparently ignored by the lower court. The short shrift the lower court gave to

this claim is inconsistent with the facts of record, runs afoul of Rule 52(a), and justifies reversal.

11. THE LOWER COURT MADE INSUFFICIENT FINDINGS OF FACT ON THE RETALIATION CLAIM:

Rule 52(a) provides that,

"In all actions tried upon the facts without a jury, or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, ..."

F.R.C.P 52(a). The factfinding must touch on all material issues or allegations raised by the plaintiff. Underwood, 816 F.2d at 775. Moreover, "For this court to exercise adequately its power of review, the district court must make specific findings about the nature and truth of the (plaintiff's) allegations." DeMedina v. Reinhardt, 686 F.2d 997, 1011 (D.C.Cir. 1982), quoting Borrell v. United States International Communications

Agency, 682 F.2d 981, 992 (D.C. Cir. 1982). Furthermore, it is insufficient for the court to merely make a finding as to the "ultimate fact" at issue.

"(T)he requirements of factfinding (under Rule 52(a)) cannot be met by a 'statemnt of ultimate fact, without the subordinate factual foundations for which it must be the subject of specific findings.'"

De Medina, 686 F. 2d at 1011 quoting from O'Neill v. United States, 411 F.2d 139, at 146 (3rdCir. 1969); See also Borrell, 682 F.2d at 992. Thus in Borrell, the appellate court reversed the lower Court's bare-bones finding for defendant on the plaintiff's whistleblowing claim. The appellate court noted that there was relevant evidence both of the petitioner's alleged unsatisfactory performance and of the agency's impropriety, forming the basis of her whistleblowing claim, but that the lower court had not adequately

addressed those issues.

"Unfortunately, the district court made one laconic finding only: that appellant's discharge was "not tained by unconstitutional improprieties." Surely that cannot be enough to satisfy the requirements of Rule 52(a) of the Federal Rules of Civil Procedure in this kind of case, where the core of the dispute is whether the employee was discharged for complaining about agency irregularities, admitted in part, or for poor job performance." Id. at 991.

The lower court stated that

"(B)efore the plaintiff initiated any protected activity the defendant had already acknowledged and attempted to correct difficulties that the plaintiff was having in performing her job. The severity of the adverse actions increased in relation to the plaintiff's poor quality of work, not in relation to the plaintiff's protected activity." Id.

This finding fails to provide the specificity required under Rule 52(a). It provides little more than a recitation of ultimate finding of fact -- a lack of nexus -- without discussing any of the specific factual findings underlying that ruling. In so doing, the trial court

ignored abundant evidence linking petitioner's informal grievances [6] and formal complaints of discrimination to the adverse treatment imposed upon her. Petitioner established that after her protected activities, she was subjected to prompt, progresssively more severe and unwarranted actions against her.

For instance, the record reflects that petitioner complained from early on of her employment that: supervisors failing to resolve her repetitive complaints about the mysteries of data, and placing her in a difficult and disadvantaged position; that supervisor had "arbitrarily" cut off research projects and her access to the computer; and that Mr. Bordes and some members of his staff were "discriminating" and "harassing" her. Pl. Ex. 25. The lower court found that everyone in the division

was using the same data and doing the same type of work are unsupported by the record below.

In April 1985, supervisor Mr. Bordes gave petitioner a progress review, indicating that the data analysis and petitioner's work needed improvement implying that the previous problems were petitioner's. Supervisor also gave some unjustified statements implying that petitioner was incompetent. Petitioner promptly appealed this performance review to the Division Director Howard Rolston, and again complained that she had been forced "to work under a biased, unsupportive management, who practices harassments and discrimination against me." Pl. Ex. 42

Supervisor's unreasonable reaction was swift, severe and progressive. Petitioner sought EEO counseling beginning

May 1985.

On July 1, 1985, she filed her first administrative complaint SSA-442-85, with a chronological list of discriminatory acts. Pl. Ex. 51. Thereafter, false statements and accusations by supervisor against the petitioner increased, which resulted in "poor" performance and unwarranted disciplinary actions, and termination. The agency would not reassign petitioner, despite her requests. Supervisor discriminatorily postponed the approval of annual leave for months. Petitioner was wrongfully discharged on June 13, 1986, when the annual leave was scheduled to begin.

Supervisors' discrimination and retaliation scheme is apparent. Another glaring evidence of retaliation came in December, 1985. When the agency's EEOC counselor came for informal complaint to

discuss resolutions of petitioner's allegations. Pl. Ex. 73. During that EEOC counseling period, supervisors unwarrantedly proposed and gave a three-day suspension with the reason that petitioner failed to respond to his note which occurred a whole month earlier. Petitioner appealed to the higher levels of management, set forth reasons of its being unjust and discriminatory. Petitioner was not aware of the assignment, until mentioned in another supervisor's note a few days later. Supervisor never came to discuss directly with the petitioner. Even if petitioner delayed for a few days on that special circumstance for the first time, petitioner should not be given a suspension, considering that other members of his staff postponed work by months or even failed to do work.

Petitioner filed a second formal administrative complaint on January 24, 1986. Pl. Ex. 73. She complained about continuing discrimination with suspension, harassment and other discriminatory acts among others. Shortly thereafter, petitioner received an even harsher performance review from the supervisors. This time she was rated unsatisfactory, giving her a zero rating in two critical performance elements-- data analysis and preparation of report. Her performance improvement plan was extended. One month later, petitioner was proposed to be removed. The removal procedures were found to be irregular and unjustified, without proper signature in the proper forms. See Pl. Ex. 114 and other Plaintiff Exhibits in the record below.

The trial court made no mention of almost all of the evidence, including

respondent's misconducts in both employment environment and processing of complaints as admitted at the trial. Those employees including supervisors who committed and were involved in misconducts were not given disciplinary actions. See petitioner's comments on the adverse actions. This is error. These evidence are briefly presented above.

It has been recognized that a causal connection between the protected activity and the adverse actions can be established solely by a sufficient closeness in time between the adverse action and the employer's awareness of the protected activity. McKenna v. Weinberger, 729 F.2d 783, 791 (D.C. Cir. 1984); Mitchell v. baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985):

"The causal connection component of the prima facie case may be established by

showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity."

Here of course, the trial court was confronted with a pattern of retaliation. District court's failure to address any of the facts of this claim supports reversal Borrell, 682 F.2d at 992.

12. TRIAL COURT'S FACTUAL FINDINGS ON THE RETALIATION CLAIM ARE CLEARLY ERRONEOUS AND MUST BE REVERSED:

Finally, the lower court also made a critical error in the spare factual findings that it did make with respect to petitioner's retaliation claim. That error goes to the heart of the retaliation claim and requires reversal. As noted earlier, the trial court found that "before the plaintiff initiated any protected activity, the defendant had already acknowledged and attempted to

correct difficulties that the plaintiff was having in performing her job." (Decision at 12.) That finding is erroneous. As we have previously explained, the evidence is uncontroverted that until November 1985, petitioner was not afforded the advanced computer training that she had requested from the outset of her employment. The Lower Court's finding that petitioner simply had not complained until after the agency tried to address her performance problems cannot square with the facts of record. It should therefore be reversed.

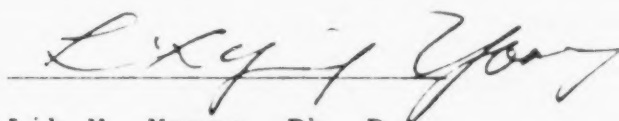
CONCLUSION

Continuing discrimination with respondent's misconducts, irregular procedures, and bad faith has prevailed in every aspect of federal employment environment and administrative and

judicial proceedings, as evidenced by the improper processing of petitioner's four administrative complaints. Lower court erred in many aspects and departed from usual course of judicial proceedings against petitioner. Material issues and plaintiff's abundant evidence were ignored and improperly disposed of, while the court findings are unsupported by the record below, and are clearly erroneous under F.R.C.P. 52(a); with erroneous trial transcripts missing plaintiff's testimonies and evidence, and improper court procedures with incomplete court file. The lower court's procedures and rulings are irregular and conflict with rules, regulations and case laws. These defeat justice system and the purpose of Title VII of the Civil Right Act of 1964 as amended, 42 U.S.C. 2000e, et. seq. and 29 C.F.R. Sec. 1613. The petition for

writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,



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[3] Petitioner timely filed two administrative complaints, ASH-262-84 and ASH-401-84 which have been fragmentated, rejected, and improperly processed through different levels of federal courts. The second complaint ASH-401-84 was rejected and forced to the court action first. The Courts ruled that all complained issues filed in these two administrataive complaints are all timely, but DHHS still refuses to conduct proper investigation, and are still pending.

[4] Originally, the transcripts of the trial was divided into three volumes with 134, 52 and 18 pages respectively. For convenience sake, these three volumes of

transcripts were binded into one by the petitioner. Plaintiff Exhibits No. 1-134 were several inches high that were binded into three volumes for easy handling. These plaintiff's exhibits and transcripts should be integrated together to yield full plaintiff's testimonies and abundant self-explanatory documentary evidence.

[5] Petitioner had provided additional information at administrative level, which was not presented at the trial because (a) to save court time as instructed by petitioner's counsel; (b) the objectives of the trial was not made clear by District Judge juridictional problems. Petitioner's counsel hardly obtained useful data and information from the respondent, despite "respondent's refusal to provide information" was also complained and respondent falsely indicated that all information has been furnished.

6 Informal complaints of discrimination are protected activity. In McKenna, the Court ruled that the appellant's oral complaints to her superiors regarding instances of sex discrimination were "clearly protected." McKenna, 729 F.2d at 791.

CERTIFICATE OF SERVICE

I, Dr. Lih Y. Young, hereby certify that on this 16th day of April, 1991, I caused to mail by first class, postage prepaid, copies of the foregoing "Petition for Writ of Certiorari," together with appendix, to the following:

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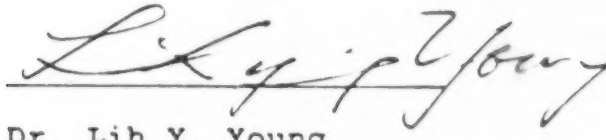

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